



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 28, 1996

Mr. Jesus Toscano, Jr.
Administrative Assistant City Attorney
Office of the City Attorney
City Hall
Dallas, Texas 75201

OR96-0259

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38761.

The Dallas Fire Department received a request for "records regarding discipline rendered by Chief Miller in the past five years as a result of any arrest of a Department member for DWI or the result of any positive testing of a Department member under the Department's Random Drug and Alcohol Testing program." As responsive to this request, the city submitted to this office a list of firefighters who tested positive for the presence of alcohol or certain illegal drugs in their urine. This list also contains a date for each listed firefighter, the substance found in each firefighter's urine, and the disciplinary action the fire department took as a result of the test results. You seek to withhold from required public disclosure the names of fire department employees on this list based on section 552.101 of the Government Code in conjunction with the common-law right to privacy, and section 552.102 of the Government Code.¹

You state:

¹As the city did not submit to this office any information responsive to the request for "records regarding discipline rendered by Chief Miller in the past five years as a result of any arrest of a Department member for DWI," we assume that either the city has released such information or the city has no such information.

The public does have a legitimate right to know if Fire Department employees are abusing drugs and the measures the Fire Department is taking to respond to the abuse, in our opinion, however, there is no legitimate concern on the part of the public to know the names of the individual Fire Department employees that tested positive for drug use. Disclosing the names of employees who tested positive for drug use would be in contravention of the Dallas Fire Department's policy of trying to rehabilitate, not punish, substance abusers. The desire of employees to seek treatment could also be impeded if the highly embarrassing and intimate fact that they have a drug problem is released to the public. Disclosing the names of the employees would be a clear invasion of their right to privacy.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

This office has recognized a privacy interest in drug test results of public employees. *See* Open Records Decision No. 455 (1987) at 5 (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3rd Cir. 1986), Open Records Decision No. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drugs may raise privacy issues), *cf.* Open Records Decision No. 343 (1982) (medical information of patient who is not public employee that relates to drug overdose or acute alcohol intoxication is protected by constitutional or common-law right of privacy); Health & Safety Code § 611.002 (making confidential records of treatment for substance abuse).

On the other hand, the public has a legitimate interest in having access to information concerning the qualifications and performance of governmental employees, including information concerning the circumstances of disciplinary action administered against an employee. *See* Open Records Decision No. 444 (1986). However, we do not believe the public's legitimate interest in governmental employees' job performance extends to matters involving the private life of that employee. We believe that the urinalysis results here may disclose information about the conduct of the employee's private life; the mere presence of alcohol or an illegal drug in an employee's urine is not in every case information about that employee's conduct on the job. Thus, the urinalysis does not necessarily measure only information about alcohol or drug use while at work or during employment with the city. Accordingly, we conclude that the city must withhold

the names of the firefighters pursuant to section 552.101 of the Government Code as information protected from disclosure by the common-law right to privacy.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref.: ID# 38761

Enclosures: Submitted document

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